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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

JOEL B. BALLON,

Petitioner,

v.

ZONING HEARING BOARD OF
THE BOROUGH OF WEST VIEW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are property owners deprived of federal due process rights to prior notice of the nature and cause of a purported zoning violation, when a state court has decided that its scheme for adjudicating alleged zoning violations, which evolved from the Standard State Zoning Enabling Act, does not require the government to produce evidence that the property owner has violated the provisions of the zoning ordinance that were charged in the formal notice of a violation, but instead permit the property owner, without notice, to be found to have violated different and uncharged provisions of the zoning ordinance?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all of the parties in the formal court proceedings in the Commonwealth Of Pennsylvania. The state procedural scheme for adjudicating alleged zoning violations requires the Borough Of West View, Pennsylvania to conduct the prosecution of the alleged violation before the Respondent, the Zoning Hearing Board Of The Borough Of West View. If an aggrieved landowner files an appeal to the Pennsylvania courts, that Zoning Hearing Board is the only named appellee, and conducts the defense of its decision on appeal.

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procedure adapted from this standard act does not require the government to produce any evidence that the property owner violated the provisions of the zoning ordinance that were charged in the notice of a violation, but instead permits the trier of fact to find a violation of different and uncharged provisions of the zoning ordinance, without any notice to the owner. 16

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Petitioner, Joel B. Ballon, respectfully requests that a writ of certiorari be issued to review the Opinion of the Commonwealth Court Of Pennsylvania entered on August 6, 2001.

OPINIONS BELOW

There are no official or unofficial reports of any of the opinions and orders entered in this case by the courts below. The Memorandum Opinion of the Commonwealth Court Of Pennsylvania is Appendix A to this Petition. The Opinion of the Court Of Common Pleas Of Allegheny County, Pennsylvania is Appendix B to this Petition. The Findings Of fact, Conclusions Of Law and Adjudication of the Zoning Hearing Board of the Borough Of West View is Appendix C to this Opinion.

STATEMENT OF JURISDICTION

The Order of The Supreme Court Of Pennsylvania, which declined to review the Opinion and Order of the Commonwealth Court Of Pennsylvania, was entered on May 29, 2002.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, 14th Amendment, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 53 P.S. 10616.1

§ 10616.1. Enforcement notice.

(a) If it appears to the municipality that a violation of any zoning ordinance enacted under this act or prior enabling laws has occurred, the municipality shall initiate enforcement proceedings by sending an enforcement notice as provided in this section.

(b) The enforcement notice shall be sent to the owner of record of the parcel on which the violation has occurred, to any person who has filed a written request to receive enforcement notices regarding that parcel, and to any other person requested in writing by the owner of record.

(c) An enforcement notice shall state at least the following:

1. The name of the owner of record and any other person against whom the municipality intends to take action.

2. The location of the property in violation.

3. The specific violation with a description of the requirements which have not been met, citing in each instance the applicable provisions of the ordinance.

4. The date before which the steps for compliance must be commenced and the date before which the steps must be completed.

5. That the recipient of the notice has the right to appeal to the zoning hearing board within a prescribed period of time in accordance with procedures set forth in the ordinance.

6. That failure to comply with the notice within the time specified, unless extended by appeal to the zoning hearing board, constitutes a violation, with possible sanctions clearly described.

(d) In any appeal of an enforcement notice to the zoning hearing board, the municipality shall have the responsibility of presenting its evidence first.

(e) Any filing fee paid by a party to appeal an enforcement notice to the zoning hearing board shall be returned to the appealing party by the municipality if the zoning hearing board or any court in a subsequent appeal rules in the appealing party's favor.

STATEMENT OF THE CASE

This Petition arises from a Zoning Enforcement Notice issued on June 7, 1999 by the Borough Of West View, Pennsylvania. Petitioner first appealed that Notice to the Respondent Zoning Hearing Board (the "Board"), then to the Court Of Common Pleas Of Allegheny County, Pennsylvania, then to the Commonwealth Court Of Pennsylvania, and finally, to the Supreme Court Of Pennsylvania.

A brief history of the evolution of zoning law in this country is necessary to appreciate the important federal question involved in this case.

Modern zoning law in the United States has its roots in the Standard State Zoning Enabling Act. While Secretary Of Commerce in the early 1920's, Herbert Hoover oversaw the drafting of a uniform act that "endeavors to provide, so far as practicable to foresee, that proper zoning can be undertaken under it without injustice and without violating property rights". *Andersons' American Law Of Zoning*, 4th Edition, sec. 2.21, page 68 (1996), citing Standard State Zoning Enabling Act, par. 3 (1926). The Standard Act was preceded by general comments that advised all states to adopt enabling acts. *Id.* State legislatures were advised to amend it as little as possible. *Id.* Every state has adopted the Standard State Zoning Enabling Act in one form or another. Dukeminier & Kreir, *Property* 1003, 1005 (3d ed. 1993). "While the enabling legislation in the several states reflects significant departures form the Standard Act, the similarities remain greater than the differences, and the Standard Act remains the most practical point of departure in the examination of state zoning enabling statutes". *Andersons' American Law Of Zoning*, 4th Edition, sec. 2.21, p. 69 (1996).

The Standard Act had extensive procedural provisions. Anderson writes ". . . [n]early one-half of the Standard State Zoning Enabling Act is devoted to the composition, jurisdiction and procedure of a board of adjustment . . ." and that ". . . [p]rovisions relating to administration are set forth at length." *Id.*, sec. 2.26, p. 72. The Standard Act ". . . [p]rovides for hearings preceded by notice. . . ." *Id.*, sec. 2.26, p. 73. The language of the Standard Act, or some variation of it, has been included in nearly all of the state enabling acts. *Id.*

The Standard State Zoning Enabling Act was enacted in Pennsylvania in a piecemeal fashion. Separate authorizations were made to different classes of municipalities, including Boroughs such as West View. In 1969, these separate grants were consolidated into one Code. One commentator summarizes this process as follows:

> Prior to 1969, land-use control powers were delegated to the several Pennsylvania municipalities by enabling statutes fashioned for each of the classes of local government. Separate enabling acts were adopted for cities of the first class (Philadelphia) cities of the second class (Pittsburgh), cities of other classes, townships, and counties. In general, these acts followed the pattern of the Standard State Zoning Enabling Act, with deviations which will be noted in context in subsequent chapters.
>
> . . .
>
> The General Assembly, in 1968, adopted the Pennsylvania Municipalities Planning Code, effective January 1, 1969. The Code specifically repealed the several enabling acts except those applicable to cities cities of the first class (Philadelphia) cities of the second class (Pittsburgh), and counties of the Second Class (Allegheny).

2 Anderson, *The Law Of Zoning In Pennsylvania*, sec. 2.04 (1982). In 1947, the Standard Act was enacted almost verbatim as part of the Borough Code. Act Of July 10, 1947, P.L. 1621, No. 568, sec. 93, amending and adding secs. 3301-3310; 53 P.S. 48301-48310 (Purdon 1957). Section 1201(3) of the 1968 legislation repealed the sections that were

applicable to Boroughs. Act Of July 31, 1968, P.L. 805, No. 247, Article XII, Section 1201(2), P.L. 847. In 1988, the 1968 legislation was reenacted and amended into substantially its present form. Act of December 21, 1988, P.L. 1329, No. 170. Progeny of the Standard Act remain in effect in Pennsylvania, as well as the other states.

Thus, the Borough Of West View issued its Enforcement Notice against the backdrop of the Standard State Zoning Enabling Act. That Notice specifically alleged that Petitioner had violated Sections 140-14C, Article VII, Section 140-14, and Section 140-48 of the Borough Of West View Code. These charges asserted that Appellant's property was not large enough to allow off street parking on a concrete pad in front of the property. The Notice did not allege that the Petitioner had made new construction or had either enlarged or changes his use of his Property. The specific sections charged in the Enforcement Notice require evidence that the property had been measured in the manner prescribed in the Zoning Ordinance. For example, Section 140-14C of the Ordinance says:

> Off street parking and loading requirements for each type of use permitted in the commercial district shall be in accordance with Article VII of this chapter.

The Notice charged that Petitioner did not have the "total square feet needed for parking" that is required by Article VII. It charged that Section 140-14 "requires a minimum front yard of 35 feet if parking is used". Section 140-14 requires a front yard that is used for parking lot to be "35 feet", but it does not specify whether that dimension is depth, perimeter, area or some other measurement. Proof of this violation would require, for example, a survey indicating that some

dimension of Petitioner's property was less than "35 feet". The critical provision of the Ordinance that prescribes "35 feet" is poorly drafted, because it does not further describe how that measurement is to be obtained. Thus, it was not possible for the Borough to offer into evidence any measurement that is either pre or pro-scribed by the Zoning Ordinance.

In addition, Section 140-25, which requires a specific number of square feet for parking spaces, only applies to new construction, or enlarged or changed uses. Paragraphs 2 and 3 of the Notice stated that the Petitioner's uses of the property "is and was" a permitted use. This negated any possibility that the Petitioner was enlarging or changing uses. It was not possible for the Borough to present evidence of "new construction" or an "enlarged" or "changed" use.

Your Petitioner filed a timely Appeal to the Board as a result of the Enforcement Notice. In his Appeal, Mr. Ballon set forth the affirmative defense, inter alia, that his parking in the disputed area was a nonconforming use that predated the ordinance. He also asserted several reasons why he had not committed the various dimensional violations that were specifically charged in the Enforcement Notice. In paragraphs 18, 20, 21 and 22 of his Appeal, he challenged the Notice's specific accusations that there was a dimensional nonconformity:

> 18. Point 5 of the Enforcement Notice are invalid in its entirety, because Article VII, Section 140-25B only applies to "new construction", or "enlargement" or "change" in "use" of the property. The Notice does not cite any such things; it merely recites the permitted and current uses.

20. Points 6 and 7 of the Enforcement Notice are invalid in their entirety, because Section 140-14 dos not say that a front yard must be 35 feet deep or a side yard must be 35 feet wide. It only says that 35 "feet" is required, without saying how to measure the 35 feet, in what direction to measure the 35 feet, or what perimeter one uses to measure the 35 feet measured.

21. Points 6 and 7 of the Enforcement Notice are invalid in their entirety, because Section 140-14 dos not say that a front yard must be 35 feet deep or a side yard must be 35 feet wide. Landowner's front yard has 35 linear feet of boundary which abuts other properties, and his side yard is at least 35 feet long.

22. Points 6 and 7 of the Enforcement Notice are invalid in their entirety, because Section 140-14 is headed "area and bulk regulations". If the area and bulk are the default unit of measurement in this section when no other sensible unit is specified, then Landowner's front and side yards are at least 35 square feet in "bulk" and "area".

The Borough failed to present evidence of any violation of the Sections 140-14C, Article VII, Section 140-14, or 140-48 at the various Hearings before the Board. It failed to present evidence that the Petitioner had committed the dimensional violations with which he was charged in the Enforcement Notice. The Borough did not put into evidence any survey of Petitioner's property to show the total "square feet" of any part of that property, or the dimensions of his

property, or that any part of it measures "35 feet".[1] In fact, it was stipulated that the Survey offered by the Borough does not measure the Petitioner's property in any respect. The Borough did not put on any evidence that the Petitioner's property was new construction or that he had made an enlargement or change in his use of the property.

The reason for the Borough's failure to present any evidence of the violations charged in the notice appears to be the impossibility of doing so, which stems from the poorly drafted Ordinance, coupled with an obsession with Petitioner's affirmative defense that his parking was a non-conforming use that pre-existed the Zoning Ordinance. The Borough's witnesses and counsel testified and argued exclusively about whether there had been parking in the disputed area over the years, and whether this was a pre-existing use.

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1. 53 P.S. 10603.1 mandates:

> In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

Petitioner Ballon was entitled to have this murky "35 feet" provision interpreted in his favor. On the other hand, if evidence had been offered of aa violation of this meaningless provision, and as a result a violation was found, then he could have challenged Section 140-14 as unconstitutionally vague.

The Board's Conclusions Of Law find that Petitioner had violated *different Sections than those charged in the Enforcement Notice* — namely, 140-25(a), 140-28(a) and 140-28(c). This is clear after a review of paragraphs. 2, 3, 4, 5, 6, 7, 8 of the Zoning Hearing Board's Conclusions Of Law, presented in the Appendix at pages 18a-19a. The Board did not find a violation of any of the Sections charged in the Enforcement Notice. Instead the Board found that:

1. there was no preexisting use;

2. that if there was a preexisting use then it had been abandoned;

3. that if the use existed and had not been abandoned, then it was illegal because it violated curb cut regulations prescribed by the Pennsylvania Department Of transportation;

and that the parking use was in violation of Sections 140-25(a), 140-28(a), and 140-28(c) of the Ordinance. *The Enforcement Notice does not give the Petitioner notice that violations of Sections 140-25(a), 140-28(a) and 140-28(c) were to be at issue at the hearing.* Its adjudication was filed on February 17, 2000 and appears in the Appendix at page 23a.

The Petitioner filed an Appeal to The Court Of Common Pleas of Allegheny County, Pennsylvania. In Pennsylvania, Courts of Common Pleas conduct the initial review of decisions made by zoning hearing boards. On October 20, 2000, Judge James of that court entered an Order that dismissed Petitioner's Appeal, and affirmed the Adjudication by the Respondent Zoning Hearing Board. Judge James' Opinion is included in the Appendix at pages 12a-14a.

Petitioner filed a timely Appeal from Judge James' affirmation with the Commonwealth Court Of Pennsylvania. The Commonwealth Court is Pennsylvania's intermediate appeal court for cases involving state or local government. On August 6, 2001, it affirmed Judge James' Order. That affirmation Order is reproduced in the Appendix at page 11a.

On October 9, 2001, the Commonwealth Court denied Petitioner's Application for reargument or reconsideration of its Decision (Appendix 24a).

Petitioner then filed a Petition For Allowance Of Appeal with the Supreme Court Of Pennsylvania. The Supreme Court Of Pennsylvania denied that Petition with a one-page order that reads as follows:

> PER CURIAM:
>
> > AND NOW, this 29th day of May, 2002, the petition for Allowance of Appeal is hereby denied.

(*See* Appendix 25a). This timely Petition to this Court followed.

The due process issue under the United States Constitution was timely and properly raised and preserved. It first appears in paragraph 17 of the Petitioner's Appeal from the Enforcement Notice to the Zoning Hearing Board. Therein, Petitioner asserts that he cannot be found to have violated different sections of the ordinance. That paragraph 17 states:

> 17. The Enforcement Notice must cite the applicable provisions of the ordinance which have been violated under 53 P.S. 10616.1(c)(3).

> The enforcement Notice is invalid in its entirety if, at the hearing, the Borough relies on any provision of the Ordinance other than Article VII, 140-14, 140-48, and 140-14C, or if it relies on any Zoning Ordinance other than the 1971 Ordinance, as amended.

Paragraph 30 of that Appeal then asserts that the Borough must produce evidence of the alleged violations:

> 30. The Borough has the burden of presenting its evidence on these matters first. 53 P.S. 10616.1(d).

It can be safely said that the Petitioner foresaw the chicanery to which the Borough and Board would resort in order to find him in violation of *something*, indeed, *anything*. In its Findings of Fact and Conclusions Of Law, the Respondent Board did not pass upon the fact that it was finding the Petitioner in violation of provisions that he was not charged with, and had no notice of.

Petitioner preserved the issue at bar via an extensive discussion of it on pages 13 to 18 of his Brief on Appeal to the Court Of Common Pleas. Judge James had previously issued an Order that specified that any issues that were not briefed would be waived. Petitioner complied with this directive, and placed this issue first in that Brief. Pertinently, pages 16 to 17 of that Brief say that Pennsylvania case law "vindicates the right to prior notice of the exact charge so that one may prepare a defense, and the right to hear and challenge the evidence of that charge". However, Judge James' Opinion says "The issue on appeal is whether the Appellant's use of the parking area is a non-conforming use that pre-dates the 1971 Zoning Ordinance" (Appendix page 13a). In effect, Judge James passed upon the issue by ignoring it.

Petitioner kept this federal constitutional issue at the forefront of his Brief to the Commonwealth Court. The first section of that Brief was entitled:

> 1. The lower court erred and/or abused its discretion when it affirmed a Zoning Hearing Board's Decision that found violations sections of the Zoning Ordinance other than those that Appellant had been charged with in the Enforcement Notice.

The third section of that Brief was entitled:

> 3. The lower court erred and abused its discretion when it affirmed the Board's Decision and thus deprived Appellant of his due process rights under the United States and Pennsylvania Constitutions, for the reasons set forth in issues 1 and 2.

Commonwealth Court addressed these issues in an unpublished Memorandum Opinion in support of its decision (*See* Appendix, Pages 1a -10a). That Opinion drags a red herring across the scent of the issue that is now presented to this Court by finding a "waiver" of that issue by Petitioner. This "waiver" excuses the Respondent Board's failure require proof of, and find, a dimensional nonconformity. The Opinion says:

> Because Balloon presented no challenge to the fact that the parking pad is dimensionally non-conforming, the Borough had no prima facie burden to prove dimensional non-compliance with evidence of actual measurements. Balloon's failure to contest the alleged dimensional non-compliance constituted waiver of the issue. (Appendix, page 8a).

Hence, the Opinion says that the Board properly decided only the issues relating to pre-existing non conforming use and Section 140-28 of the ordinance, because that was the theory of entitlement asserted by Petitioner in his Appeal to the Board.[2] The complete text of the Commonwealth Court's "red herring" appears on pages 7a and 8a of the Appendix.

In fact, the Petitioner had challenged the Borough's contention that the pad was dimensionally non-conforming in paragraphs 18, 20, 21 and 22 of his Appeal, as set forth above. The Commonwealth Court's avoidance of the hard issue presented herein hinged on its mistaken belief that Petitioner did not challenge the alleged dimensional non-conformities.

The Commonwealth Court's Opinion finds that the Zoning Hearing Board erred when it found that Petitioner had violated Department Of Transportation curb cut requirements. (Appendix pages 8a-10a). This finding eliminates an alternative and independent state law basis for the decision, putting the spotlight on the issue that is presented in this Petition.

The Petitioner made that issue the sole question before the Supreme Court Of Pennsylvania. He styled it as follows in his Petition For Allowance of Appeal:

> Did the Commonwealth Court decide a question of substance which was not theretofore determined by the Supreme Court Of Pennsylvania, and which is

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2. If Ballon had waived the right to contest a dimensional violation, then the Zoning Hearing Board's site visit, noted on page 5 of the Commonwealth Court Opinion, had no purpose.

> not in accord with 53 P.S. 10616.1(d), and/or applicable decisions of the Supreme Court of Pennsylvania and of the United States, when it failed to require the Respondent to first offer evidence that the Petitioner had violated one of the sections of the Zoning Ordinance that were charged in the Enforcement Notice issued to your Petitioner, thus depriving Appellant of his due process rights to notice under the United States and Pennsylvania Constitutions?

The Supreme Court Of Pennsylvania was not required to pass upon the issue while making its decision whether or not to accept the case. Thus, it did not address its merits when it issued its order declining the case.

The import of the Pennsylvania courts' treatment of the issue is clear. Under Pennsylvania's statutory scheme setting forth a procedure for zoning violation cases, a property owner need not receive any notice of the ultimate charge that he must meet at a hearing. Nor does the government have to produce any evidence at the hearing of whatever charges that it choose to make in its Enforcement Notice. The trier of fact can choose willy-nilly from the text of the zoning ordinance and find a violation of whatever charges suit its fancy. Most importantly, when one traces this due process abomination to its source, one finds a common procedural scheme that has flowed to all fifty states – the Standard State Zoning Enabling Act.

REASONS FOR GRANTING THE WRIT

The Petition should be granted because Pennsylvania's procedure for adjudicating zoning violations, which evolved from a standard enabling act that has been adapted in all of the states, deprives property owners accused of zoning violations of federal due process rights to prior notice of the nature and cause of a purported zoning violation. The Pennsylvania courts have ruled that the procedure adapted from this standard act does not require the government to produce any evidence that the property owner violated the provisions of the zoning ordinance that were charged in the notice of a violation, but instead permits the trier of fact to find a violation of different and uncharged provisions of the zoning ordinance, without any notice to the owner.

This Petition should be granted because the Pennsylvania court decisions, which were made under a procedural scheme that is used in some form in all fifty states, conflicts with this Court's prior rulings on a litigant's fundamental due process rights in administrative proceedings. These rights were described in *Morrissey v. Brewer*, 408 U.S. 471 (1972), a case which examined the due process involved in revocation of parole rights:

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the

> interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Fuentes v. Shevin*, 407 U.S. 67 (1972). Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Id. at 408 U.S. 481. Given that zoning violation proceedings may impose a severe restriction on an individual's property, it cannot be gainsaid that some sort of process is due your Petitioner in the case at bar.

The *Brewer v. Morrissey* opinion continues: "We now turn to the nature of the process that is due, bearing in mind that the interest of both State and parolee will be furthered by an effective but informal hearing." *Id.* at 408 U.S. 471, 484-485. This Petition has already demonstrated, via the history of the Standard State Zoning Enabling Act and its

current Pennsylvania formulation in 53 P.S. 10616.1(d), that in all states zoning violation cases are heard in "informal hearings" such as those contemplated for parole violators in *Morrissey v. Brewer*.

Hence the same process is due in parole revocation and zoning violation cases. Finally, *Morrissey v. Brewer* says notice of the charge that one has to meet is essential to due process in an "effective but informal hearing":

> We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation, others by judicial decision usually on due process grounds. (footnote omitted) Our task is limited to deciding the minimum requirements of due process. They include *(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him;* (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and *(f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.* We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

Id. at 408 U.S. 471, 488-489 (emphasis added). This passage aptly summarizes the procedure that is provided in zoning violation proceedings in all fifty states as a result of the Standard State Zoning Enabling Act and the subsequent statutes that are its progeny. The emphasized portions of this passage clearly proscribe any procedure that excuses the prosecutor from producing evidence of the charges in the notice, and permits the fact finder to instead find a violation of other charges. That is unacceptable from a due process standpoint.

The Respondent Board might be tempted to draw some fine distinction between the deprivation of liberty involved in the Morrissey case, and the "mere" impairment of property rights visited upon the Petitioner. However, this Court has held that proceedings involving milder potential sanctions require written notice of the charges that one must face, and proof of the noticed charges, not other charges. In *Goss v. Lopez*, 419 U.S. 565 (1975) high school students were suspended from school for misconduct for up to 10 days without a hearing. This court held that due process requires that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his version. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987) held that an employer has an interest in controlling the makeup of its work force. Its contractual right to discharge employees for cause that is entitled to due process protection, when facing a hearing where the possible sanction was a direction that the employee be reinstated. The *Brock* case held that appropriate protections included pre-reinstatement notice of the employee's allegations and notice of the substance of the relevant supporting. *See Id.* at 481 U.S. 263-267. Section 7501 of the Lloyd-Lafollette Act, 5 U.S.C. 7501,

was upheld as comporting with due process requirements in *Arnett v. Kennedy*, 416 U.S. 134 (1974). That statute provided a procedure for removal of non-probationary federal employees "only for such cause as will promote the efficiency of the service". It prescribed that the employee must be furnished with written notice of the proposed removal action and a copy of the charges, given a reasonable time to make a written answer and provide and supporting affidavits, and must promptly receive the agency's decision. Section 7501 did not require examination of witnesses, trial, or hearing; but a post-removal evidentiary trial-type hearing was provided at the appeal stage. The upshot of these cases is that even if the possible sanctions is as mild as a school suspension, the prosecutor must provide evidence of that which is charged, not evidence of something else. The fact finder must determine whether that evidence supports that which is charged, not some other violation. These are the minimum due process requirements, regardless of whether the case is civil or criminal, or whether a liberty or a property right is in jeopardy.

Interestingly, the Commonwealth Court Of Pennsylvania has already dealt with the exact same issue that is advanced by Petitioner. It made the same holding that is now being urged by your Petitioner. *Champion v. Commonwealth Of Pennsylvania, Board Of Probation And Parole*, 395 A.2d 671 (Pa. Cmwlth. 1978), holds that if the parole board gave notice of one ground for violation of parole in its notice and then revokes parole on another ground, then the lack of notice is a violation of the due process clause of the 14th Amendment to the United States Constitution. This case that raises to constitutional levels the exact same procedural defect that occurred in Petitioner's case, and goes so far as to cite *Morrissey v. Brewer* as four square support for its decision.

See id. at 395 A.2d 672. The Supreme Court Of Pennsylvania is also well ahead of the Petitioner. It has held that defendants in municipal enforcement actions are afforded the same protections as defendants in criminal proceedings. *In Re Investigating Grand Jury*, 437 A.2d 1128, 1132 (1981). With the two pillars of his case already established in Pennsylvania law, it is impossible to explain to the Petitioner why he heard no evidence of the charges against him, and was instead found to have violated different sections of the ordinance those charged.

The only possible explanation is that the procedural provisions of the Standard State Zoning Enabling Act, as they have evolved in each of the fifty states, do not permit such a result. As part of this evolution, the Pennsylvania legislature enacted 53 P.S. 10616.1(d) (Purdon 1997):

> In any appeal of an enforcement notice to the zoning hearing board, the municipality shall have the responsibility of presenting its evidence first.

Until now, no Pennsylvania court had decided whether the municipality, or the zoning appellant, has the burden of proof under this statute; or the co-existent question of what the party bearing that burden must establish before the other party is required to proceed with evidence. Petitioner has not found any case from another state that addresses the issue. This important but undecided question has now sprung to the forefront. Petitioner's case is a precedent that suggests to all of the states that notice of charges, and proof of those same charges, is not required in zoning violation cases. Thus this Court must consider this case.

The failure to produce evidence of, or find, one of the violations charged in the enforcement Notice results in a conundrum. There could not be a question of whether a non-conforming use exists, is lawful, or was abandoned, unless a violation of the ordinance is found first. It is not tautology to suggest that there cannot be a "non-conforming use" until the "use" is shown to be "non-conforming" in some way. The Petitioner was only charged with various dimensional violations. At his hearing, your Petitioner waited patiently for some evidence of such a violation, and heard none.

The Commonwealth Court avoided these tough issues and excuses the failure to prove and find a dimensional nonconformity by saying that Petitioner did not challenge the fact that the parking pad was dimensionally non-conforming (a "waiver"). Supposedly, the Board properly decided only the issues relating to pre-existing non-conforming use, because that was the theory of entitlement asserted by Petitioner in his Appeal to the Board.[3]

However, as set forth above, the Petitioner had also challenged each of the Borough's contention that the pad was dimensionally non-conforming in Paragraphs 18, 20, 21 and 22 of his Appeal from the Enforcement Notice. He pointed out that Section 140-14 of the Ordinance is poorly drafted. Upon reading it, one cannot determine how the specified dimension (which is "35 feet") is to be measured. Petitioner's Appeal asserted that he does have *35 square feet*, and also a *perimeter of 35 feet*. Thus there are several ways in which his property literally complies with these vague,

3. If Ballon had waived the right to contest a dimensional violation, then the Zoning Hearing Board's *sua sponte* site visit, noted on page 5 of the Commonwealth Court Opinion, served no purpose.

inconsistent, and ambiguous dimensional requirements.[4] His Appeal also pointed out that he cannot be accused of violating Section 140-25, pertaining to square footage for parking spaces, because that Section only applied to new construction, or an enlarged or changed use — all of which were ruled out by the Notice's statements that his uses "is and was permitted". These four paragraphs of the Appeal were self-standing, because 53 P.S. 10603.1 requires that doubts as to the intended meaning of a zoning ordinance must be resolved in his favor. The Respondent Board, and its reviewing courts below, had to address these ambiguities before they can find that there was a violation. They were not free to find violations of different Sections, without first treating the dimensional violations that were charged.

It is evident from the structure of the Commonwealth Court's Opinion that there are no independent state grounds for the issue that is presented by this Petition. That court was obliged to treat the issue at bar first in its Opinion. It could not reach the questions of whether Department of Transportation regulations bar it, or whether Balloon's evidence lacked credibility, without first determining that the finding of uncharged violations was proper.

Thus, this case presents important questions related to federal due process requirements in zoning cases in all fifty states. These issues relate to whether a formal notice of the charges has real meaning, who has the burden of

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4. If, on the other hand, the Zoning Hearing Board's site inspection is viewed as providing visual evidence of whether or not Appellant had "35 feet", visual observation does not resolve the issue of which 35 feet, or what kind of 35 feet, are to be measured under the poorly-drafted Ordinance.

producing evidence and the ultimate burden of proof, and what quantum of evidence is necessary to meet either burden. The Commonwealth Court Opinion states that this statute does not impose a burden of proof; but only prescribed the order of evidence presentation. No authority is cited for this legal proposition. It is inconsistent with the mighty plain language of 53 P.S. 10616.1(d), which charges the municipality with "presenting its evidence first". It is also inconsistent with the federal due process requirements that attend any zoning case in this country, and the precedents of this court setting forth due process requirements in cases of similar import. This case presents an excellent opportunity to set zoning appellants' federal due process right to prior notice of the exact charge against them in all fifty states, so that one may prepare a defense, as well as the right to hear and challenge the evidence of that charge.

CONCLUSION

Accordingly, Petitioner Joel B. Ballon respectfully requests that his Petition For A Writ Of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION AND ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED AUGUST 6, 2001

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 2542 C.D. 2000
Argued: May 8, 2001

Joel B. Ballon,

Appellant

v.

Zoing Hearing Board of the Borough of West View

BEFORE: HONORABLE DORIS A. SMITH, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE LEADBETTER

FILED: August 6, 2001

Joel B. Ballon (Ballon) appeals from the order of the Court of Common Pleas of Allegheny County that affirmed the decision of the Zoning Hearing Board of the Borough of

West View (ZHB). The ZHB sustained the enforcement notice citing Ballon for using a paved area in front of his building in violation of the zoning ordinance.[1]

In 1970, Ballon purchased the lot and two-story building at 479 Perry Highway,[2] a heavily traveled thoroughfare in the Borough of West View. At the time of Ballon's purchase, the building housed a paint store on the first floor and an apartment on the second floor. In 1972, the Borough enacted a zoning ordinance that placed Ballon's property in the C-1 Commercial District. From 1970 until 1988, Ballon operated a photography studio on the first floor and maintained the apartment on the second floor as his residence. From 1988 until 1996, Ballon leased the photography studio to another photographer. At present, the studio is offered for lease and Ballon lives in the second floor apartment. There is no dispute that Ballon's present use of the building is permitted in the C-1 District. The dispute concerns the use of the front yard for parking on a concrete pad located between the building's façade and the Borough's paved sidewalk along Perry Highway.

The Borough's Zoning Officer, Ken Wolf, issued a Notice of Zoning Violation that stated, in pertinent part:

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1. The Borough's zoning ordinance is set forth in Chapter 140 of the Code of the Borough of West View.

2. Ballon's lot was created by a subdivision recorded in 1906, *i.e.*, lot no. 254 in the "Bellevue Land Company's Plan of Lots." It is a nearly rectangular parcel with a total area of approximately 4,500 square feet.

Appendix A

[Y]our current use of a paved and/or concrete portion of [your] property as a parking space is in violation of the zoning laws of the Borough of Westview, as set forth in the Code of the Borough of West View (Code). Your action in parking, or allowing individuals to park in the area designated violates the Code of the Borough of West View in the following respects:

. . . .

4. Off street parking and loading requirements are set forth as applicable to C-1 under Section 140-14C of the Code.

5. Article VII provides for the total square feet needed for parking for the uses intended for the property. You fail to meet those parking space requirements.

6. Section 140-14 requires a minimum front yard of 35 feet if parking is used. Your parking in the area in question does not meet this minimum front yard requirement.

7. Section 140-14 requires a minimum side yard of 35 feet in width with parking. Your parking in the side yard not only lacks the 35 foot minimum, but also constitutes a trespass on Borough property.

8. Further, your improvement to the property by installing this pad constituted work *for which*

> a building permit, and site plan approval were required by the Planning Commission under Section 140-48 of the Code, since the intended area was improved in order to be utilized as a parking area. The Borough has no record of your (sic) ever having sought such approval.
>
> It is the Borough's position also that any uses of the property you might have had that were nonconforming ancillary commercial uses have expired because the property has not been used for commercial purposes for at lease (sic) one year continuously.

The Notice further informed Ballon that failure to stop using the concrete pad would result in fines of $500.00 per day for each offense and that Ballon had thirty (30) days to file an appeal to the Zoning Hearing Board (ZHB).

Ballon filed an appeal to the ZHB listing in thirty separately numbered paragraphs his grounds for challenging the enforcement notice. Ballon did not challenge the zoning officer's allegation that the parking is out of compliance with the area and set back requirements of the ordinance.[3]

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3. Subsection 140-14B of the Borough Code sets forth, in Table No. 4, the area and bulk regulations for the C-1 District, in pertinent part, as follows: minimum front yard required for permitted commercial uses is 10 feet or 35 feet if front parking is used; minimum side yard required for permitted uses except residential is 10 feet or 35 feet with parking. Subsection 140-14C of the Code directs that "[o]ff-street parking and loading requirements for each type of use

(Cont'd)

In summary, he contended that the enforcement notice did not satisfy the requirements in Section E16.1(c)(4) and (c)(6) of the Municipalities Planning Code (MPC), 53 P.S. § 10616.1(c)(4) and (c)(6).[4] He also asserted that, under Section 616.1 (d) of the MPC, the Borough bears the initial burden to prove the violations listed in the enforcement notice.[5] He further asserted that parking in the area in front of the building is a pre-existing non-conforming use.

At the hearing before the ZHB, the Borough withdrew its allegation that Ballon was violating the side yard setback. The evidence on both sides focused solely on whether parking

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(Cont'd)

permitted in the Commercial district shall be in accordance with Article VII of this chapter." Article VII, Section 140-25 establishes that for off-street parking "the total parking space for one (1) vehicle shall be equal to at least three hundred twenty (320) square feet and shall have a stall of at least nine by twenty (9 x 20) feet in size."

4. Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101 — 11202. Section 616.1 was added by the Act of December 21, 1988, P.L. 1329, *as amended,* 53 P.S. § 10616.1. Subsections 616.1(c)(4) and (c)(6), respectively, require that the enforcement notice state "[t]he date before which the steps for compliance must be commenced and the date before which the steps must be completed" and "[t]hat failure to comply with the notice within the time specified, unless extended by appeal to the zoning hearing board, constitutes a violation, with possible sanctions clearly described."

5. Section 616.1(d) of the MPC states, "[i]n any appeal of an enforcement notice to the zoning hearing board, the municipality shall have the responsibility of presenting its evidence first." 53 P.S. § 10616.1(d).

in front of Ballon's building is a pre-existing nonconforming use. The Borough presented testimony of past and present Borough police officers, the crossing guard stationed near Ballon's property for the past twenty years, and a Borough Councilman who, as the former Fire Chief, spent significant time at the Borough Fire Hall next to Ballon's property. These witnesses testified consistently that the area in front of Ballon's building was not used for parking until recently. The Borough also introduced the deposition of Ronald Krusienski, District Permit Manager for the Pennsylvania Department of Transportation (DOT), who testified that driveway access from Ballon's property to Perry Highway requires a permit and no permit has been issued to Ballon. Following the Borough's presentation of evidence, Ballon presented testimony in support of his contention that both customers of the photography studio and Ballon's family routinely parked in the area in front of his building. After both sides completed their presentation of evidence, the ZHB elected *sua sponte* to conduct a site visit. After announcing that no comment or testimony would be permitted during the view, ZHB members accompanied by counsel for both parties walked the short distance to Ballon's property.

The ZHB rejected the testimony by Ballon's witnesses as not persuasive or credible and, consequently, found that Ballon did not meet his burden to prove that parking on the site is a pre-existing non-conforming use. The ZHB additionally found that "the use of [Ballon's] front yard for access to Perry Highway would be dangerous given the angle of the roadway and short site distance." *In re Ballon* (ZHB Adjudication, filed February 17, 2000), slip op. at 4. In its conclusions of law, the ZHB determined that, even if Ballon had proven routine and longstanding use of the front yard for parking,

failure to obtain a DOT permit for access to Perry Highway and unsafe conditions for ingress and egress rendered the use of the parking pad illegal. Based on these findings and conclusion, the ZHB sustained the enforcement notice.

Ballon appealed to common pleas. Common pleas discerned no error in the ZHB's determination that Ballon had not proven entitlement to parking as a pre-existing non-conforming use. The court, therefore, affirmed the ZHB. This appeal followed, in which Ballon contends that (1) the enforcement notice is defective, (2) the Borough failed to meet its burden to prove the dimensional non-conformities alleged in the enforcement notice, (3) the ZHB sustained the enforcement notice on grounds not alleged in the notice, and (4) the Borough cannot extinguish his preexisting non-conforming parking use by retroactive application of DOT highway access regulations.

Each of these arguments lack merit. The enforcement notice is not defective. It contains all the elements of information required under Section 616.1 of the MPC, 53 P.S. § 10616.1. Specifically, it states that compliance must be immediate and thereby satisfies subsection 616.1(c)(4). The notice also informs Ballon that noncompliance may result in sanctions and that he may appeal to the ZHB; it thereby satisfies subsection 616.1(c)(6).

Section 616.1(d), in directing that the municipality shall present its evidence first, does not impose a burden of proof; it only prescribes the order of evidence presentation in a landowner's appeal to the ZHB. Ballon, as the appellant, was obliged to assert the grounds on which he challenged the violations alleged in the enforcement notice. In his appeal to the ZHB, Ballon contested the enforcement notice on the

basis of technical deficiencies in the form of the notice and his right to use the parking pad as a pre-existing non-conforming use. Because Ballon presented no challenge to the fact that the parking pad is dimensionally non-conforming, the Borough had no prima facie burden to prove dimensional non-compliance with evidence of actual measurements.[6] Ballon's failure to contest the alleged dimensional non-compliance constituted waiver of the issue. This is in accord with the established rule that a landowner's failure to appeal an enforcement notice to the ZHB will render the municipality's charge of violation binding and unassailable. *Johnston v. Upper Macungie Township*, 638 A.2d 408 (Pa. Cmwlth, 1994).

Ballon's last two arguments merit only brief discussion. First, there is no merit to Ballon's assertion that the ZHB sustained the enforcement notice on grounds not alleged in the notice. In its decision, the ZHB dealt with the issue of pre-existing non-conforming use and Section 140-28 of the ordinance (pertaining to continuation of a pre-existing non-conforming use) because this was the theory of entitlement asserted by Ballon in his appeal.[7] Ballon's final contention is that "[t]he Board illegally placed a retroactive burden upon

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6. Indeed, in ascertaining the probable existence of a dimensional violation, the Borough may depend upon the observations of its zoning officer who will make his assessment without entering on the subject properly to take actual measurements. *Cf. Township of Lower Milford v. Britt*, 695 A.2d 958 (Pa. Cmwlth. 1997) (holding that preliminary injunction authorizing zoning officer's entry and inspection not a violation of the United States or Pennsylvania Constitutions).

7. Section 140-28 regulates non-conforming uses, in pertinent part, as follows: (Cont'd)

a lawful pre-existing use when it applied PennDOT regulations to Appellant's parking use." (Brief at p. 19). While we do not agree with the ZHB's conclusion regarding DOT's permit requirements,[8] this is merely an alternative basis for the ZHB's decision. Since we agree with the ZHB that Ballon failed to establish a lawful pre-existing use, it is immaterial whether DOT regulations operate to prohibit its continuation.

(Cont'd)

A. Continuation and/or expansion.

(1) Lawful uses located either within a building or other structure, or part thereof, or on the land, or in combination of both, which, at the effective date of this chapter, or subsequent amendment thereto, become nonconforming may be continued so long as they remain otherwise lawful, including subsequent sales of the property.

. . .

C. Discontinuance. If a nonconforming use of land or building ceases operation for a continuous period of more than six (6) months, then this shall be deemed to be an intent to abandon such use, and any subsequent use of land shall conform to the regulations of this chapter. This regulation shall not apply to any single-family or two-family use.

8. The ZHB concluded that "[e]ven if the applicant may have established a nonconforming use, the failure of the applicant to obtain a PennDOT curb cut permit to use Perry Highway as a means of ingress and egress would clearly prevent the continuation of the use as specified in Section 140-28(A)(1) which requires that the

(Cont'd)

Appendix A

The ZHB's determination that Ballon's evidence lacks sufficient credibility and weight dictates our decision in the present appeal. Ballon had the burden to prove his contention that parking on the site is a pre-existing nonconformity. *Jones v. Township of North Huntingdon Zoning Hearing Bd.*, 467 A.2d 1206, 1207 (Pa. Cmwlth. 1983). The ZHB is the sole arbiter of the credibility and weight of evidence. *Appeal of Lester M. Prange, Inc.*, 647 A.2d 279, 282 (Pa. Cmwlth. 1994). In this case, the ZHB did "not find Ballon or his witnesses' testimony as to the issue of parking in front of the subject property as a nonconforming use to be either persuasive or creditable (sic)." *In re Ballon* (ZHB Adjudication, filed February 17, 2000), slip op. at 5. Based on this finding, Ballon failed to sustain his burden of proof.

Accordingly, we affirm.

s/ Bonnie Brigance Leadbetter
BONNIE BRIGANCE LEADBETTER,
Judge

(Cont'd)

nonconforming use remain otherwise lawful." *In re Ballon,* (ZHB Adjudication, filed February 17, 2000) slip op. at 6. The permit requirement imposed by 67 Pa. Code § 441.3(a) applies only to new driveway construction or alteration of existing driveways. There is no evidence that Ballon has done either of these since the adoption of the regulation in 1980. Hence, the ZHB improperly relied on the permit requirement to bolster its conclusion that even pre-existing parking had been rendered otherwise unlawful. This is not to say, as Ballon argues, that DOT safety regulations cannot be applied to driveways existing at the time the regulations are adopted; they can be. See *Department of Transp. v. Longo,* 510 A.2d 832 (Pa Cmwlth. 1986). However, there is no evidence that DOT has determined that Ballon violated any regulation applicable to existing driveways.

Appendix A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 2542 C.D. 2000

Joel B. Ballon,

Appellant

v.

Zoning Hearing Board of the Borough of West View

ORDER

AND NOW, this 6th day of August, 2001, the order of the Court of Common Pleas of Allegheny County in the above captioned matter is hereby AFFIRMED.

s/ Bonnie Brigance Leadbetter
BONNIE BRIGANCE LEADBETTER,
Judge

APPENDIX B — OPINION AND ORDER OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA CIVIL DIVISION DATED OCTOBER 20, 2000

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA CIVIL DIVISION

No. S.A.2000-38

JOEL B. BALLON,

APPELLANT,

v.

ZONING HEARING BOARD OF THE BOROUGH OF WEST VIEW,

APPELLEE

OPINION

JAMES, J. 10-20-00

The Appellant is the owner of real property known as 479 Perry Highway, West View. The property has a two-story building that is used for a photography studio on the first floor and residential on the second. Both uses are permitted in a C-1 district. The property fronts on Perry Highway a major roadway maintained by PennDot. The appellant was cited for permitting parking in the front yard of the property. A timely appeal was filed to the Zoning Hearing Board.

Appendix B

The Issue before the Board was whether the parking at this property is a non-conforming use that pre-dates the 1971 Zoning Ordinance. After taking testimony, receiving affidavits from PennDot Officials and taking a view of the property, the Board affirmed the Zoning Officer's decision and denied Appellant's appeal. This timely appeal was then filed.

The issue on appeal is whether the Appellant's use of the parking area is a non-conforming use that pre-dates the 1971 Zoning Ordinance. Where the court does not accept additional evidence and reviews the appeal from the Board's order solely on the record as presented to the Board, the trial court's scope of review is confined to determining whether the Board abused its discretion or committed an error of law. *Upper Saucon Township v. Zoning Hearing Board of Upper Saucon Township*, 583 A2d 45, 48 (Pa. Cmwlth. 1990). The court may conclude that the Board abused its discretion only if the findings are not supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 553, 462 A.2d 637, 640 (1983).

A non-conforming use is an activity or structure pre-dating the relevant zoning restrictions or any pertinent amendments thereto. *Estate of Barbagallo v. Zoning Hear. Bd.*, 574 A.2d 1171, 1173 (Pa. Cmwlth. 1990). The benefit of legal non-conforming use status is available only for the lawful use, which existed on the land when the ordinances took effect and it is the burden of the party proposing the existence of such non-conforming use to establish both its existence and legality before the enactment of the ordinance at issue. *Antonini v. Zoning Hearing Board of Marble Township*, 505 A.2d 1076, 1079 (Pa. Cmwlth. 1986).

Appendix B

Testimony was received from the District Manager of PennDot who is responsible for overseeing highway occupancy permits. The subject property fronts on Perry Highway, a roadway under the control of PennDot. He testified that the property lacks a PennDot curb cut (a legal right to enter Perry Highway). The use of this property as a parking lot with entry onto Perry Highway is not a legal use.

Furthermore, Ms. Deanne Ebbert testified that she has been employed as a crossing guard near the subject property. She has observed the area for twenty years and her credible testimony shows that cars rarely parked in the area. On two occasions she has asked appellant to move vehicles parked in the front, since they blocked her view.

The Board heard the witnesses, reviewed the exhibits and conducted a view of the property. It is the duty of the Zoning Board in the exercise of its discretionary power to determine whether a party has met its burden of proof. *A.A. Shaniah v. Hellam Township Zoning Hearing Board*, 648 A.2d 1299, 1304 (Pa. Cmwlth. 1994). Determination as to the credibility of witnesses and the weight to be given to the evidence are matters left solely to the Board in the performance of its fact-finding role. *Borough of Youngville v. Zoning Hearing Board of the Borough of Youngville*, 450 A.2d 1086, 1088 (Pa. Cmwlth. 1982). The record supports the decision and it will be affirmed.

BY THE COURT,

s/ [illegible] J.

Appendix B

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA CIVIL DIVISION

No. S.A.2000-38

JOEL B. BALLON,

APPELLANT,

v.

ZONING HEARING BOARD OF THE BOROUGH OF WEST VIEW,

APPELLEE

ORDER OF COURT

AND NOW, to wit, this 20th day of October, 2000, the appeal is dismissed and the decision of the Board is hereby affirmed.

BY THE COURT,

s/ [illegible] J.

APPENDIX C — FINDINGS OF FACT, CONCLUSIONS OF LAW AND ADJUDICATION

BEFORE THE ZONING HEARING BOARD OF THE BOROUGH OF WEST VIEW

IN RE:

JOEL B. BALLON

Background

1. On June 7, 1999, the Borough of West Yew, through its Secretary/Manager, issued a notice of zoning violation ("Violation Notice") against Joel B. Ballon ("Ballon").

2. The Violation Notice cited Ballon for his action in parking or allowing individuals to park in an area directly in front of his property located at 479 Perry Highway.

3. The Violation Notice recited that:

   a. The property is located in a C-1 district.

   b. The use as a store or photography studio is and was a permitted use.

   c. The residential use in the upstairs apartment is a permitted use.

   d. Off street parking and loading requirements are set forth as applicable to C-1 under Section 104-14(C) of the Code.

e. Article VII provides for the total square feet needed for parking for the uses intended for the property. Applicant fails to meet those parking space requirements.

f. Section 140-14 requires a minimum front yard of 35 feet if parking is used. Applicant's parking in the area in question does not meet this minimum front yard requirement.

g. Section 140-14 requires a minimum side yard of 35 feet in width with parking. Applicant's parking in the side yard not only lacks the 35 foot minimum, but also constitutes a trespass on Borough property to the extent such parking crosses the property line.

h. Applicant's improvement to the property by installing a "parking pad" in his front yard constituted work for which a building permit and site plan approval were required by the Planning Commission under Section 140-48 of the Code, since the intended area was improved in order to be utilized as a parking area. The Borough has no record of Applicant ever having sought such approval.

4. The Violation Notice stated that Ballon should cease and desist from these violations immediately and failure to do so would result in the Borough seeking enforcement of the zoning requirements by the issuance of citations and fines in the amount of $500.00 per day for each offense.

5. The Violation Notice stated that Ballon had 30 days to appeal the decision to the Zoning Hearing Board.

6. Ballon filed a timely appeal of the Violation Notice to the Zoning Hearing Board.

7. The appeal raised a number of defenses to the Borough's action.

8. Public hearings were held on Tuesday, November 16, 1999, Wednesday, November 17, 1999, Thursday, November 18, 1999 and Thursday, December 9, 1999.

9. The Borough took deposition of PennDOT official Ronald Krusienski on November 22, 1999. Said deposition was presented to the Board in support of the Borough's case.

10. The Board, at its December 9, 1999 hearing, viewed the subject property.

Findings of Fact

1. The Appellant, Joel B. Ballon, is the owner of property situate at 479 Perry Highway in the Borough of West View.

2. The subject property contains a commercial store front with a second story apartment located along Perry Highway, a/k/a State Route 19, a heavily traveled two-way thoroughfare.

3. Directly across Route 19 from the subject property is the West View Elementary School.

4. Students at the school regularly and routinely use the sidewalk in front of the subject property.

5. Section 140-25(A) of the West View Zoning Ordinance states the standards for off-street parking:

> "Off-street parking spaces with a proper and safe access shall be provided within a structure or in the open to adequately serve the use to which the lot within each district".

6. Section 140-14(C) requires a 35 foot front yard for parking.

7. Applicant purled the building in 1970 for a photography studio.

8. Ronald Krusienski, who is a District Permit Manager for PennDOT, is responsible for overseeing PennDOT's Highway Occupancy Permit Program, which includes all utility permits and all driveway access permits, and testified that there is no PennDOT curb cut permit for the subject property.

9. Further, the Board finds that the use of Applicant's front yard for access to Perry Highway would be dangerous given the angle of the roadway and short site distance.

10. Deanne Ebbert was a crossing guard at the corner of Chalfonte and Perry Highway, a location three buildings away from the subject property.

Appendix C

11. Ms. Ebbert testified that:

a. She served as crossing guard four hours a day (7:00 a.m. to 9:00 a.m., 11:15 a.m. to 1:00 p.m. and 2:30 p.m. to 4:15 p.m.).

b. She has held that position of crossing guard continuously for 20 years into the 1990's.

c. She has, on a couple occasions, observed cars loading and unloading in front of the subject property.

d. She has requested that Applicant move his automobile from in front of his building as it interfered with her sight lines along Perry Highway.

e. She testified that she liked to keep the sidewalk in front of Applicant's property clear of automobiles for the safety of students walking to school.

f. She testified that, other than the two occasions when she asked the applicant to move his car, she had not observed cars parked in front of the subject property.

12. Conflicting testimony was presented as to whether the front of Applicant's property was used for parking prior to Borough's adoption of its Zoning Ordinance on February 16, 1972.

13. The Board does not find Ballon or his witnesses' testimony as to the issue of parking in front of the subject property as a nonconforming use to be persuasive or creditable.

14. The Board finds that Applicant has not carried his burden of proof with respect to establishing that a nonconforming use of parking in front of his building existed prior to the adoption of the Zoning Ordinance.

15. Applicant presented evidence as to his alleged business relationship with elected Borough officials.

16. As Applicant chose not to identify any other alleged customers by name (other than those that testified), the Zoning Hearing Board concludes that the use of the names of elected Borough officials was done in an effort to impermissibly influence the Board's decision making process.

17. In the collective experience of the Zoning Hearing Board, this has never occurred before.

18. The Zoning Hearing Board finds such conduct to be repugnant and the identity of Applicant's alleged customers is irrelevant.

19. The Zoning Hearing Board accepts and adopts the testimony of Deanne Ebbert.

Conclusions of Law

1. The burden of proving the existence and extent of a nonconforming use rests on the property owner who could claim the benefits of the rights to be afforded the property with that status. *Appeal of Lester M. Prange, Inc.*, 647 A.2d 279 (Pa. Commw. 1994), *Overstreet v. Z.H.B. of Schuylkill Twp.*, 412 A.2d 169 (Pa. Commw. 1980).

Appendix C

2. Section 140-28(A) of the Zoning Ordinance pertaining to nonconforming use regulations states that "the nonconforming use may be continued so long as they remain otherwise lawful including subsequent sales of the property".

3. Ballon did not establish a nonconforming use of the space in front of his building as a parking space.

4. The Ordinance states under Section 140-28(C) regarding discontinuance of a nonconforming use that:

> "If a nonconforming use of land or a building ceases operation for a continuous period of more than six months, than this shall be deemed to be intent to abandon such use and any subsequent use of the land shall conform to the regulations of this chapter. This regulation shall not apply to any single family or two family use."

5. Even if the applicant may have established a non-conforming use, the failure of the applicant to obtain a PennDOT curb cut permit to use Perry Highway as a means of ingress and egress would clearly prevent the continuation of the use as specified in Section 140-28(A)(1) which requires that the nonconforming use remain otherwise lawful.

6. Using the subject property as ingress and egress to Perry Highway would clearly not be lawful without a PennDOT permit.

7. Additionally, the parking regulations under Section 140-25(a) provides that off street parking spaces have proper and safe access.

Appendix C

8. Further, the access, due to tile limited site lines, would be dangerous and not proper and safe.

9. Lastly, based upon the testimony submitted by Ms. Ebbert that except on a couple occasions she did not see cars parked in front of the subject property, It is clear that the Borough has met the criteria to establish an abandonment of the nonconforming parking for at least a period of six months.

10. Even assuming the Borough had not established an abandonment, there could be no parking on the subject property without a proper permit to access Perry Highway.

11. Applicant's appeal of the Zoning Office's decision must be denied and the Zoning Officer's opinion be affirmed.

Adjudication

The Borough of West View Zoning Hearing Board hereby upholds the decision of the Zoning Officers citation dated June 7, 1999.

s/ Dennis A. Watson
Dennis A. Watson, Chairman

s/ Ronald Papania
Ronald Papania

s/ Robert Vogel
Robert Vogel

APPENDIX D — ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED OCTOBER 9, 2001

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 2542 C.D. 2000

Joel B. Ballon,

Appellant

v.

Zoning Hearing Board of the Borough of West View

ORDER

NOW, October 9, 2001, having considered appellant's application for reargument, the application is denied.

BY THE COURT:

s/ Joseph T. Doyle
Joseph T. Doyle, President Judge

APPENDIX E — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT DATED MAY 29, 2002

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

No. 641 WAL 2001

Petition for Allowance of Appeal from the Order of the Commonwealth Court

JOEL B. BALLON,

Petitioner

v.

THE ZONING HEARING BOARD OF THE BOROUGH OF WEST VIEW,

Respondent

ORDER

PER CURIAM:

AND NOW, this 29th day of May, 2002, the Petition for Allowance of Appeal is hereby denied.